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No. 84-1783

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Richard Gerald Jordan (Petitioner) submits this reply to the arguments presented by the State of Mississippi (Respondent) in its brief in opposition to the petition for a writ of certiorari to the Supreme Court of Mississippi.

Respondent's brief contains a number of misstatements concerning the record. While most of these misstatements are not material to the issues at hand, we note the following: Although Respondent states that "petitioner forced [the victim] onto her knees and shot her in the back of the head," [1] it cites absolutely no support in the record for this assertion. Petitioner has consistently maintained that he shot the victim, without intent to kill, after she had started to run away,[2] and the jury's findings are consistent with this version of the facts.[3]

ARGUMENT

I.

Respondent argues that the evidence of Petitioner's behavior and accomplishments while in prison was properly excluded as irrelevant. This argument flatly contradicts the decision of a plurality of this Court in *Lockett v. Ohio*, 438 U.S. 586 (1978), that in a capital sentencing hearing a defendant must be permitted to adduce evidence of "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." [4]

Respondent cannot seriously maintain that the evidence excluded here had no bearing on Petitioner's character or record. Rather, Respondent asserts in effect that

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[1] Respondent's Brief in Opposition at 8.

[2] *See* Petition for Writ of Certiorari at 4 & n.6.

[3] *See* 464 So. 2d at 480, App. 7a (jury did not find that Petitioner intended to kill, instead finding that he "contemplated lethal force [would] be employed").

[4] 438 U.S. at 604 (footnote omitted).

the evidence of Petitioner's post-crime behavior and record is suspect because it is self-serving. Indeed, Respondent appears to suggest that *any* evidence of the post-crime behavior of a capital defendant is excludable:

> [I]t can hardly be said that the testimony concerning petitioner's actions and behavior while he was sitting on death row could be relevant in this case. The entire time petitioner was on death row he was either fighting the death sentence he was under or preparing for retrial on the issue of sentence once he had been successful in getting the original sentence overturned. . . . It can do nothing but benefit him [to] become the model prisoner and to set himself to some outwardly worthwhile task. It tells us nothing that is relevant to his receiving the death sentence on retrial.[5]

Respondent's argument, if credited at all, would go to the weight of the evidence, not its admissibility. Respondent was free to argue to the jury that Petitioner's testimony should be discounted as self-serving. But Respondent's position that the post-crime behavior of a capital defendant is per se excludable, as irrelevant, flies in the face of *Lockett*.

Indeed, the dissent of four justices below is testimony that many citizens would have considered Petitioner's behavior quite significant. Although Respondent would have this Court believe the contrary, not every death-row inmate spends his time in prison productively making a substantial invention that can benefit society. As the dissent below recognized, evidence that Petitioner here did so could very well have made the difference between life and death for Petitioner. To quote Justice Robertson below, "Not all of us are without the capacity to see as proper the amelioration of the harshness of the law in the face of genuine repentance, pursuit of atonement and demonstrably responsible behavior." [6]

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[5] Respondent's Brief in Opposition at 20-21.

[6] 464 So. 2d at 491, App. 30a (Robertson, J., concurring in part and dissenting in part).

Respondent's other arguments on this issue, also have no merit. As noted by the dissent below,[7] the record shows that the excluded testimony would not have been hearsay, and the trial judge did not exclude the evidence on hearsay grounds.[8] But, even if one assumes arguendo that the excluded testimony would have been hearsay, it nevertheless should have been admitted. *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam), does not permit the mechanical application of the hearsay rule to exclude evidence of mitigating circumstances in capital sentencing proceedings.[9] The majority below completely ignored *Green*, and Respondent seeks to distinguish *Green* by asserting that the evidence "did not go to the very heart of the sentencing process."[10] Yet, as Justice Robertson eloquently stated, the testimony about Petitioner's capacity to contribute to society *did* go to the heart of the life-or-death decision.[11]

II.

Respondent does not deny that the trial judge gave the jury no guidance whatsoever regarding the proper limits of the aggravating circumstance "especially heinous, atrocious or cruel." Nor does Respondent deny that the Mississippi Supreme Court did nothing on appeal to

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[7] *Id.* at 489, App. 27a.

[8] The colloquy between the trial judge and counsel for Petitioner concerning whether Rhett Russell would be permitted to testify regarding Petitioner's invention demonstrates that the trial judge excluded the evidence because it arose after the crime, not because it was hearsay. Petitioner's counsel stated that "Mr. Russell is familiar with all those details and would testify about that," and the judge's only question to counsel was whether Mr. Russell's testimony concerned "some thoughts and ideas that have been developed by Mr. Jordan since he has been in prison." App. 53a.

[9] 442 U.S. at 97 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

[10] Respondent's Brief in Opposition at 21.

[11] 464 So. 2d at 490-91, App. 30a-31a (Robertson, J., concurring in part and dissenting in part); *see also id.* at 491-92, App. 32a-33a (Hawkins, J., joining Robertson, J.).

ensure that this aggravating circumstance was applied in a constitutional manner in this case. Rather, Respondent attempts to avoid the mandate of *Godfrey v. Georgia*, 446 U.S. 420 (1980), by arguing that the decision of a plurality of this Court in *Godfrey* is somehow inapplicable to the Mississippi capital sentencing statute. In effect, Respondent argues that Mississippi need not limit in any way the aggravating circumstance "especially heinous, atrocious or cruel" because the Mississippi statute has already narrowed the class of persons who are subject to capital punishment.

Respondent has missed the point. Whether or not the Mississippi definition of capital murder narrows the class of persons eligible for the death penalty, the Mississippi statute—unlike the Texas statute on which Respondent so heavily relies—requires the sentencing jury to weigh the aggravating and mitigating circumstances in determining whether to sentence a defendant to life or death. If the jury is to weigh aggravating and mitigating circumstances, it is imperative that the aggravating circumstances not be unconstitutionally vague.[12]

Respondents' own lengthy quotations from *Zant v. Stephens*, 462 U.S. 862 (1983), refute its argument. For example, this Court, in explaining why the presence of an improper aggravating circumstance did not render the death sentence unconstitutional, emphasized that:

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[12] To quote the Fifth Circuit's observations in vacating Petitioner's earlier death sentence:

> The State argues that if, under Texas law, the statutory offense is sufficient to constitute the aggravating circumstance, the same should hold true for Mississippi. This argument misses the point. Proof of guilt of the statutory offense may well have been a sufficient and constitutional basis on which to assess the death penalty if the jury had been limited to that proof. But not only was the consideration by the Petitioner's jury of aggravating circumstances not so limited; each juror was invited to decide for himself or herself what was an aggravating circumstance. That will not pass muster under *Godfrey* and its predecessors.

Jordan v. Thigpen, 688 F.2d 395, 397 (5th Cir. 1982) (per curiam).

> In Georgia . . . the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.[13]

The Court explicitly distinguished the Georgia statute from others that "require[] the jury to weigh the aggravating circumstances against the mitigating circumstances when it decides whether or not the death penalty should be imposed." [14] The Mississippi capital punishment statute, unlike the Georgia statute, explicitly directs the jury to find that "there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances" [15] before imposing the death penalty.

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[13] *Zant v. Stephens*, 462 U.S. at 873-74 (footnote omitted), *quoted in* Respondent's Brief in Opposition at 26. Similarly, the *Zant* Court explained that under the Texas scheme in *Jurek v. Texas*, 428 U.S. 262 (1976), "aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution and certainly were not explicitly balanced against each other." 462 U.S. at 876 n.13, *quoted in* Respondent's Brief in Opposition at 33.

[14] *Zant v. Stephens*, 462 U.S. at 874 n.12 (citing Ark. Stat. Ann. § 41-1302(1) (1977); N.C. Gen. Stat. § 15A-2000(b) (1978); Tenn. Code Ann. § 39-2-203(g) (1982); Wyo. Stat. § 6-2-102(d)(i) (1983)). Thus, Respondent is quite incorrect to characterize the Mississippi statute as "unique," Respondent's Brief in Opposition at 36. *See, e.g.*, Ala. Code §§ 13A-5-45 to -46 (1975); N.M. Stat. Ann. § 31-20A-2 (Supp. 1981); Utah Code Ann. § 76-3-207 (Supp. 1983). Respondent's misapplication of *Zant v. Stephens* to one of the numerous statutes requiring the weighing of aggravating and mitigating circumstances merely underscores our previous observation that this issue is among the most critical in death penalty litigation. Petition for Writ of Certiorari at 18.

[15] Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1984).

In short, Respondent has not shown any justification for the Mississippi courts' refusal to apply the *Godfrey* mandate. The lower courts' disregard for this Court's precedent justifies certiorari.

III.

Respondent does not deny that the prosecutor's comments in his closing argument constituted egregious misconduct. For example, Respondent makes no attempt to justify the prosecutor's statements that the jury had "a duty and a job . . . to impose the death penalty" and that the victim's two young children "demand" the death penalty, statements to which Petitioner's counsel immediately objected.[16] Similarly, Respondent makes no attempt to demonstrate that the prosecutor's commentary regarding Petitioner's refusal to testify in earlier trials in this case—commentary to which Petitioner's counsel also objected immediately[17]—was more probative than prejudicial, as required by *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).[18] Instead, Respondent appears to argue

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[16] App. 74a; *see* Petition for Writ of Certiorari at 21-22 & n.58.

[17] App. 64a.

[18] *See also* Petition for Writ of Certiorari at 25-26 & nn.70-71. In addition, Respondent never denies the impropriety of the prosecutor's statement that "I have never in my eleven (11) years of practice ever seen a case so atrocious, so cruel and inhumane, that justifies the death penalty as this particular case does." App. 65a. As the Eleventh Circuit recently observed, "Such comments, made by an experienced prosecutor, may alter the jury's exercise of complete discretion by suggesting that a more authoritative source has already decided the appropriate punishment." *Tucker v. Kemp*, 762 F.2d 1480, 1484 (11th Cir. 1985) (en banc); *see also Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985) (en banc). This Court has recently confirmed that a death sentence is unconstitutional when based on "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others." *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2641-42 (1985); *see also id.* at 2639 ("it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere").

that Petitioner did not raise below on appeal the same aspects of the closing argument that the petition raises and did not make contemporaneous objections at trial. Both points are without merit.

Respondent concedes that Petitioner raised in his initial brief below the numerous objectionable portions of the prosecutor's closing argument.[19] Focusing on the Mississippi Supreme Court's silence on this issue, Respondent suggests that Petitioner needed to raise the point in his rehearing petition in order to preserve the issue for this Court's review. Even if that were true, Respondent's claim that Petitioner did not raise in his petition for rehearing the "other highly improper and prejudicial remarks" made in the prosecutor's closing argument is wholly inaccurate. In his petition for rehearing, Petitioner expressly stated that:

> in holding that the prosecutor's closing argument did not amount to reversible error, the Court's opinion focuses on those portions of the argument in which the prosecutor commented on Petitioner's failure previously to take the stand. *But Petitioner urged in his briefs—and continues to urge now—that the prosecutor made other improper and prejudicial remarks that require reversal* . . . . For example, the prosecutor told the jury: "I feel strongly about this case. And I'm not going to sit here as an officer of the Court and lie to you about the facts in this case. . . . [*Y*]*ou have a duty and a job consist*[*e*]*nt with the oath that you took when it was administered to you—to impose the death penalty when the facts and circumstances are warranted.* And they are warranted here." . . . Defense counsel objected to these remarks about the prosecutor's personal views and the jury's "duty." [20]

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[19] Respondent's Brief in Opposition at 46; *see also* App. 91a-96a.

[20] Brief in Support of Petition for Rehearing at 1 n.1 (emphasis added in part); *see also* Petition for Rehearing at 2 (urging, as a ground for rehearing, that "[t]he prosecutor's closing argument included numerous references to the defendant's prior exercise of

Furthermore, Respondent is wrong as a matter of law in its assertion that this Court does not have jurisdiction over this case because the Mississippi Supreme Court failed to address some of the issues brought before it.[21] It is patently absurd to suggest that, when faced with a well-pleaded federal claim, a state court may deprive this Court of jurisdiction simply by rejecting the claim sub silentio. The state court had the first opportunity to consider the constitutional arguments. Nothing more is required to give this Court jurisdiction.[22]

Equally specious is Respondent's argument that Petitioner did not properly preserve his grounds for appeal because he failed to object contemporaneously to every single one of the prosecutor's numerous improper closing remarks. In fact, Petitioner's counsel made two objections during the prosecutor's closing argument, both of which were overruled, and one more at the conclusion of the argument—even though Mississippi courts relax their contemporaneous objection requirement in death penalty cases because of the seriousness of the punishment that may be inflicted.[23] This Court has recently recognized that opposing counsel should only rarely interrupt a closing argument by objecting to improper statements.[24] In-

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his Fifth Amendment right not to testify as well as other highly improper and prejudicial remarks").

[21] Respondent cites *Webb v. Webb*, 451 U.S. 493 (1981), a child custody case, for the proposition that this Court has no jurisdiction where a question was not presented *and* passed on in the state court. *Webb* is distinguishable from the instant case, however, because there the petitioner had failed to raise her federal claim in the state court.

[22] *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (explaining policy reasons for rule).

[23] *See, e.g., Williams v. State*, 445 So. 2d 798, 810-12 (Miss. 1984) (recognizing lack of contemporaneous objection, but reaching error assigned on appeal anyway), *cert. denied*, 105 S. Ct. 803 (1985); *Culberson v. State*, 379 So. 2d 499, 506 (Miss. 1979), *cert. denied*, 449 U.S. 986 (1980).

[24] *United States v. Young*, 105 S. Ct. 1038, 1046 (1985) ("interruptions of arguments, either by an opposing counsel or the pre-

stead, this Court has suggested that an objection at the close of an improper argument, along with a request that the judge give a timely warning and an instruction to the jury to disregard the improper statements, are sufficient to preserve an appeal.[25] Petitioner's counsel substantially complied with this suggestion.[26]

Even if one assumes arguendo that Petitioner's counsel did not object in a timely fashion, this Court has jurisdiction. Earlier this Term, in *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), this Court held that "[t]he mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case."[27] Moreover, the state court opinion must *expressly* indicate that it is based on the state procedural bar—here, the alleged absence of a contemporaneous objection—for this Court's jurisdiction to be precluded.[28] The majority opinion below, however, never states that it rests on any independent state ground. In fact, in resolving all the issues, the state supreme court explicity found for Respondent on the merits of the case, without addressing any supposed procedural default.[29]

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siding judge, are matters to be approached cautiously"); *cf. Brooks v. Kemp*, 762 F.2d 1383, 1397 n.19 (11th Cir. 1985) (en banc) (observing that "professional courtesy" kept defense counsel from interrupting improper argument, but noting that objection was eventually made, and reaching issue).

[25] *Young*, 105 S. Ct. at 1045-46 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974)).

[26] A request for a curative instruction following the trial court's immediate overruling of Petitioner's post-argument objection would have been futile.

[27] 105 S. Ct. at 2638.

[28] *Id.*

[29] *Cf. County Court of Ulster County v. Allen*, 442 U.S. 140, 152-53 (1979) (federal habeas corpus proceeding). Another indication that the state supreme court did not rest its decision on an

In short, Respondent has made no attempt whatsoever to justify the prosecutor's closing argument, and there is no bar to this Court's jurisdiction to decide the propriety of his commentary. The cavalier treatment of Petitioner's argument by the Mississippi Supreme Court, far from depriving this Court of jurisdiction, shows a disregard of federal constitutional rights that warrants this Court's intervention.

CONCLUSION

The importance of the questions presented is shown not only by the petition, but by Respondent's brief itself. We respectfully request that this Court grant the petition for a writ of certiorari to review the five-to-four decision of the Supreme Court of Mississippi.

Respectfully submitted,

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independent state ground is the court's extensive reliance on federal case law in its opinion. *See Michigan v. Long*, 463 U.S. 1032, 1037 (1983) (no adequate and independent state ground where "[t]he court below referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law").

[30] Counsel wish to express their appreciation to Teresa D. Baer, a summer associate at Wilmer, Cutler & Pickering, for her assistance in the preparation of this brief.